

Department of Labor and Industry
Board of Personnel Appeals
PO Box 6518
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STATE OF MONTANA
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF THE UNFAIR LABOR PRACTICE CHARGE NO. 12-2001

MONTANA PUBLIC EMPLOYEES)
ASSOCIATION)

Complainant,
-vs-

MONTANA STATE FUND; CARL)
SWANSON, PRESIDENT; JOANNE)
SHYDIAN; AND OTHERS)
Defendant.)

INVESTIGATIVE REPORT
AND
NOTICE OF INTENT TO DISMISS

I. Introduction

On May 22, 2001, the Montana Public Employees Association, filed an unfair labor practice charge with the Board of Personnel Appeals alleging that the Montana State Fund and others, violated Section 39-31-201, MCA, by restraining, coercing and threatening bargaining unit members in the exercise of statutory bargaining rights, attempting to dominate the bargaining unit by direct communications to employees, refusing to supply requested information relevant to bargaining, and issuing ultimata to bargaining unit members. Defendant counsel, Poore, Roth, and Robinson, P.C. has been authorized as the designated representative of the Montana State Fund under 39-31-301, MCA. Defendants have denied any violations of law and have requested the charge be dismissed.

1 Michael Bentley was assigned by the Board to investigate the charge, however,
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3 Mr. Bentley is no longer available to conduct the investigation. John Andrew was
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5 therefore appointed to investigate the matter.
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7 **II. Discussion**

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9 The Board of Personnel Appeals has jurisdiction over this matter under Sections
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11 39-31-103 and 39-31-405, MCA. The Montana Supreme Court has approved the
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13 practice of the Board of Personnel Appeals in using Federal Court and National Labor
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15 Relations Board (NLRB) precedent as guidelines in interpreting the Montana Collective
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17 Bargaining for Public Employees Act, State ex rel. Board of Personnel Appeals vs.
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19 District Court, 183 Montana 223 598 P.2d 1117, 103 LRRM 2297; Teamsters Local No.
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21 45 vs. State ex rel. Board of Personnel Appeals, 185 Montana 272, 635 P.2d 185, 119
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23 LRRM 2682; and AFSCME Local No. 2390 vs. City of Billings, Montana 555 P.2d 507,
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25 93 LRRM 2753. To the extent cited in this decision, federal precedent is considered
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27 applicable.
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31 This dispute concerns conduct arising as a result of midterm bargaining over
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33 economic issues contained in a labor agreement which expires June 30, 2003. The
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35 parties concluded negotiations over the midterm changes in June of 2001. The
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37 substance of the midterm modifications is contained in a letter of agreement dated June
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39 13, 2001, Appendix "O" of Defendant's response to charges.
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42 Complainant makes a three part charge, the first being that the Defendant and/or
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44 its agents restrained and coerced its members in the course of bargaining over a
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46 proposed change in overtime pay. During the course of bargaining the Defendant
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48 proposed changes dealing with compensation for certain employees either exempt, or
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1 to be exempted, from overtime provisions of the Fair Labor Standards Act. The result
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3 would be a sharing in the Defendant's Exempt Incentive Program. The threats to its
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5 members that Complainant sees are oral and written and occurred on or about the
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7 following dates and in the following contexts: November 27, 2000 bargaining session;
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9 December 11 letter from Defendant; April 6, 2001 letter from Defendant; May 9 Montana
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11 State Fund intranet article. Contained in those communications are statements about
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13 an 11.25 % adjustment to bargaining unit wages to remain market competitive should
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15 the bargaining unit not ratify and the parties not reach an agreement on an alternate pay
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17 system. Based on communications between this investigator and Complainant's
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19 exclusive representative part of this charge also deals with bargaining unit composition
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21 subsequent to a review by the Montana State Fund relating to exempt versus non-
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23 exempt status for purposes of the Fair Labor Standards Act. As a result of that review
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25 by the Montana State Fund previous supervisory employees, not in the bargaining unit,
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27 became part of the bargaining unit. In the view of the Complainant this presence of
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29 "supervisory" employees had a coercive effect on bargaining unit dynamics and unduly
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31 influenced membership in their decisions about management proposals.
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36 In the second part of the charge Complainant accuses Defendant of attempting
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38 to interfere with and dominate the administration of the protected activity of the
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40 bargaining unit. Again, Complainant references what it characterizes as threats of
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42 reduction in pay that it contends Defendant directly communicated to unit members.
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45 In the third part of its charge the Complainant accuses the Defendant of failing to
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47 provide requested information needed for bargaining in a timely fashion while at the
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49 same time setting unrealistic deadlines for agreement on the wage issues - "ultimata".
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1 Additionally, Complainant charges that Defendant campaigned for favorable votes from
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3 union members on the wage issues. Complainant also brings forward an issue about
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5 whether or not certain of its members can be “FLSA exempt”, an issue not properly in
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7 the purview of the Board of Personnel Appeals in terms of determining status.
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10 Although the parties have now agreed to changes in overtime pay, language on
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12 exempt status of certain unit employees and Gainsharing Program eligibility for some
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14 unit members effective July 1, 2001 (Defendant Exhibit O), Complainant contends that
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16 the bargaining and ratification processes were flawed so significantly as to warrant a
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18 hearing.
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21 In response to the assertions of the Complainant the Defendant offers that
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23 beginning in November 2000 the parties met to midterm bargain over the three already
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25 mentioned topics. At the November 27 session, someone suggested, as opposed to
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27 requested in the Defendant’s view, that historic unit overtime data would be useful in
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29 negotiations. Defendant’s bargaining representative then, and again during the
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31 December 11 bargaining session, notified Complainant’s agent that the task of
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33 gathering all of the information was quite time consuming. Some information was
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35 provided nonetheless. In late January 2001 the parties met again at which time
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37 Defendant says it shared its’ recently acquired Gainsharing Program information. On
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39 March 13, Complainant, via letter, notified Defendant the supplied overtime information
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41 was incomplete and requested that the remainder be produced by the end of April. By
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43 early April Defendant states that all requested information was provided to Complainant.
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45 Thereafter, Defendant says that in an April 30, letter Complainant’s agent thanked it for
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47 providing the information and notified it that the bargaining team was “excited” over the
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1 wage-related proposals defendant had put forth. The parties met again on May 8,
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3 during which time Defendant asked that Complainant conduct a secret ballot election
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5 over ratification of the Gainsharing Program proposals. That was done on May 22,
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7 resulting in an average 90% approval of the three proposals. As already mentioned, the
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9 parties then agreed in writing to the three wage related proposals.
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12 Turning its attention to the direct dealing/communications with employees' aspect
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14 of the charge the Defendant cites Machinists Dist. Lodge 190, Local 1414 v. NLRB
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16 (Putnam Buick), 126 LRRM 2247 (CA91987) enforcing 122 LRRM 1344 (1986). NLRB
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18 v. United Technologies Corp. Pratt & Whitney Aircraft Div., 122 LRRM 2250 (CA2
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20 1986); Huck Mfg. Co. v. NLRB, 112 LRRM 2245 (CA5 1982); Lear Siegler, 126 LRRM
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22 1073 (1987), enforced in part 133 LRRM 2479 (CA10 1989); and Emhart Industry.,
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24 Hartford Div. 133 LRRM 1066 (1987). Defendant refutes all charges of directly dealing
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26 and communicating with its represented employees. Defendant further points out that it
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28 and Complainant entered into bargaining and exchanged proposals. No direct
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30 communication nor any coercion occurred nor were unit members forced into any
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32 captive audience meetings or communications. Defendant's employees were free to
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34 visit the intranet website where bargaining information was posted if they wished to, or
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36 they could ignore it just as easily. As well, Complainant was made aware that
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38 Defendant President/CEO would be communicating the historic information
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40 summarizing the parties' negotiations up to and including the three tentative
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42 agreements up for ratification vote. See Appendix "M" to the Defendant's response to
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44 the ULP. Moreover, the Defendant asserts its right to protected speech referencing
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46 Lear Siegler.
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1 Addressing the issue of the obligation to provide requested information,
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3 Defendant insists that it supplied all the requested data in a manner as timely as
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5 possible considering the great number of hours involved. In addition, United Carbide
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7 Corp., Nuclear Div., 119 LRRM 1077 (1985) and Dallas and Mavis Forwarding Co., 131
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9 LRRM 1272 (1988) are noted as holding legal the defensible delay of providing
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11 information. Defendant again points out the April 30, letter expressing thanks for the
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13 overtime information expressing excitement about a feasible tentative agreement.
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16 It is well established that contract ratification votes and procedures are internal
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18 union business and that the employer interference with those processes is unlawful.
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20 London Chop House, Inc., 111 LRRM 1302 (1982); and Sheridan Manor Nursing Home,
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22 165 LRRM 1051 (1999). Threats or notifications of unilateral wage reductions by
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24 employers have as well, been ruled to be against the Act. Talsol Corp. 151 LRRM1097
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26 (1995). On the other hand, predictions of economic consequences due to the actions of
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28 unions by employers have been held legal by courts. General Electric Co. v. NLRB,
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30 155 LRRM 2881 (CA DC 1997); and Crown Cork and Seal Co v. NLRB, 147 LRRM
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32 2449 (CA DC 1994). Although in the instant case the parties reached a signed
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34 agreement over the wage issues in contention, the Courts and NLRB have held that that
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36 fact alone does not necessarily moot any possible or probable unfair labor practices.
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38 The question of whether or not a collective bargaining agreement moots a Board order
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40 has been determined to be an issue of fact, something proper for a hearing and
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42 analogous to the instant case. Pegasus Broadcasting v. NLRB 152 LRRM 2065 (CA
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44 1996). Having a signed agreement in place has not automatically mooted unfair labor
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46 practice charges stemming from incidents prior to reaching agreement. Taft
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1 Broadcasting Co., WBRC-TV v. NLRB, 113 LRRM 3816 (CA 11 1983), enforcing 111
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3 LRRM 1340 (1982); and Wagers-Roth Hosiery Co., Inc., 73 LRRM 1051 (1969). In
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5 Teamsters Local 703 (Testa, Produce), 153 LRRM 1016 (1996) ratification of a contract
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7 offer overcame any objections union officials had for certain proposals made by an
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9 employer. An employer's liability for unilateral changes in contract terms ends with
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11 execution of a new contract. NLRB v. Cauthorne T/A Cauthorne Trucking, 111 LRRM
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13 2698 (CA DC 1982).
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16 Having reviewed all relevant case material and having further communicated with
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18 the exclusive representative it is found that given the totality of conduct there is no merit
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20 to the charge. Moreover, having considered relevant case law in conjunction with the
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22 facts of this case there is no merit to a setting this matter for hearing. There were no
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24 "artificial deadlines". Complainant unit members had adequate time to consider and
25
26 then vote on the proposed changes. White Cap, 158 LRRM 1241 (1998). Defendant
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28 did not directly communicate with its employees in circumvention of the exclusive
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30 bargaining agent. It met the test of NLRB v. Pratt and Whitney Aircraft Div., 122 LRRM
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32 2250 (2nd Cir 1986), in that it "dealt with the employees through the union." See also
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34 Machinists District Lodge 190 v. NLRB, 126 LRRM 2247 (CA9 1987), (also cited by
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36 Defendant). Additionally, the change in the composition of the bargaining unit, i.e. the
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38 presence of former supervisors in the rank and file, does not constitute a violation of the
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40 act. To be sure, these individuals may have had particular knowledge of proposals and
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42 may have even enjoyed substantial influence within the bargaining unit because of their
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44 former status, but nonetheless they were members of the unit and entitled to their
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46 views. Nothing is illegal in that. Similarly, nothing is inherently illegal in polling or
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1 campaigning employees prior to an election as long, as in the instant case, that an
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3 employer does not seek to undermine the union's authority Vons Grocery Co., 151
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5 LRRM 1173 (1995) and Anderson Enterprises, 166 LRRM 1123 (1999). No direct
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7 dealing or communication with bargaining unit employees occurred. Defendant simply
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9 informed them through established communication methods of proposals already before
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11 bargaining representatives of the association. American Pine Lodge Nursing v.
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13 NLRB, 160 LRRM 2201 (CA 4 1999). Complainant acknowledges that Defendant had
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15 supplied all requested pertinent information for bargaining, although not necessarily as
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17 speedily as it had wished. Dallas and Mavis Forwarding Co., 131 LRRM 1272 (1988).
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19 The "threats" of November 27, December 11, April 6, and May 3, are not persuasive as
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21 to whether they were threats, let alone the fact that Complainant continued to bargain
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23 over the contentious issues; had ample time to file charges since November 2000; and
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25 had notice and opportunity to bargain. NLRB v. Pinkston-Hollar Construction Svcs. 139
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27 LRRM 2686 (CA 5 1992); and Nabors Trailers v. NLRB, 135 LRRM 2188 (CA 5 1990).
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32 **III. Recommended Order**

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34 It is hereby recommended that Unfair Labor Practice Charge 12-2001 be
35 dismissed.
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37
38 DATED this ____ day of August 2001.
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41
42 BOARD OF PERSONNEL APPEALS
43
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45 By: _____
46 John Andrew
47 Investigator
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I, _____, do hereby certify that a true and correct copy of this document was mailed to the following on the ____ day of August 2001 postage paid and addressed as follows:

Carter Picotte, Esq.
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